Njihia v Opus Property Limited & another; Gachanja & another (Interested Parties) (Judicial Review Miscellaneous Application E203 of 2024) [2025] KEHC 8958 (KLR) (Judicial Review) (23 June 2025) (Judgment)

Neutral citation: [2025] KEHC 8958 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

JUDICIAL REVIEW MISCELLANEOUS APPLICATION E203 OF 2024

RE ABURILI, J

JUNE 23, 2025

BETWEEN

PAUL KIBUBA NJIHIA .... APPLICANT

AND

OPUS PROPERTY LIMITED .... 1ST RESPONDENT

REGISTRAR OF COMPANIES .... 2ND RESPONDENT

AND

VICTOR MUTURI GACHANJA .... INTERESTED PARTY

ALEXANDER MWANGI MAGU .... INTERESTED PARTY

JUDGMENT

1. The substantive Notice of Motion before this court was filed pursuant to leave granted on 17th September 2024 by Justice Ngaah. The motion is brought under sections 8 and 9 of the *Law Reform Act*, Section 860 and 864 of the *Companies Act*, Sections 1A,1B and 3A of the *Civil Procedure Act* and Order 53 Rule 1(2) of the Civil Procedure Rules.

2. The application seeks the following orders:

   a. That the Honourable Court be and is hereby pleased to grant an Order of Certiorari quashing the decision of the Respondents to effect 'changes' in the 1st Respondent's CR12 altering the shareholding rights of the Applicant and the installation of the 1st and 2nd Interested Parties as Directors of the 1st Respondent.

b. That the Honourable Court be and is hereby pleased to grant an Order of Certiorari quashing the unprocedural, improper and illegal decision of the 1st Respondent removing the Applicant as the Director Operations.

c. That the Honourable Court be and is hereby pleased to grant, as a consequence of Order 2 above, an Order of Mandamus, compelling the 2nd Respondent to expunge from its register, the illegal, improper and unprocedural changes made to the list of directors/shareholders, CR 12.

d. That the Honourable Court be and is hereby pleased to grant, also as a consequence of Order 2 above, an Order of Mandamus, compelling the 2nd Respondent to update and/or rectify its register with the details of the Applicant as a bona fide shareholder of 250 shares as was contained in list of directors/CR 12 as of 23rd January, 2024 the illegal, improper and unprocedural changes were made.

e. That the Honourable Court be and is hereby pleased to grant an Order of Mandamus, compelling the 1st Respondent's directors to convene a meeting for the following purposes: conducting a comprehensive company audit, and/or approval of the audit done by CM. Maingi on 22nd February 2024 and address the issue of dissolution of the company.

f. That the costs of this application is borne by the Respondents.

3. The application is grounded on the supporting affidavit of Paul Kibuba Njihia, the exparte applicant, sworn on 25th September, 2024.

4. The Applicant's case is that he has been an employee, a joint minority shareholder with one other director Margaret Wanjiku Magu holding 25% shares, an appointed Director of Operations, a Financial Controller, and generally the day-to-day general managing director of Opus Property Limited for the past twenty-five (25) years.

5. He states that pursuant to the CR 12 dated 23rd January, 2024 the Company was and has always been constituted of the following bonafide directors and shareholders; Alfred Magu Mwangi who holds 50% shares, Margaret Wanjiku Magu who holds 25% shares, who is the wife to the majority shareholder and himself.

6. According to the applicant, until June 2023, he was always on the forefront when it came to the day to day running of the company and checking the company's financial standing, especially when the majority shareholder was mostly in and out of the country due to health complications (2018-2023).

7. That during this period, he as the Finance Controller, withdrew Kshs. 4, 100, 000.00 from the company's bank accounts, with the blessing of the fellow directors, for personal reasons. He urges that he this did within the purview of his powers as a director of the company, pursuant to the Articles of Association dated 3rd August 1999.

8. It his case that since all the directors were signatories to the company's bank accounts, himself included, he sought and received the consent of two co-directors without any condition, whatsoever, attached and they approved his loans.

9. He further states that after seeing that he had built some stronger customer relations, and the improvements made to the company, the majority shareholder in conjunction with his wife, started concocting unfounded and false allegations of embezzlement against him in a bid to kick him out of

the company and as such to avoid unnecessary fights and for the good of the Company, he, as a show of good faith, decided to repay the company's money back, as he had always intended to do.

10. He continues to state that he relinquished his interest in the ownership of his double cabin pickup truck Registration Number KCS 677C, valued at about Kshs.2, 800, 000.00 and a piece of land situated in Murang'a Title Number; Kakuzi/Kinimiri/Block 7/869 valued at Kshs. 700,000.00 to the company, leaving him with a balance of only Kshs. 800,000.00.

11. The Applicant further avers that in furtherance of the ploy to oust him from his directorial, employment status and shareholding rights, the majority shareholder and his wife on 2nd June 2023, convened, without proper notice, a directors' and shareholders' meeting with only one agenda that he must be stripped of his shareholding rights and/or must go.

12. According to the Applicant the meeting, was attended by himself, Alfred Magu Mwangi Margaret Wanjiku Magu, Alexander Mwangi Magu who is the son to Alfred Magu & Margaret Wanjiku Magu (the two directors) and Victor Muturi Gachanja who is also related to the two directors aforementioned.

13. That during the aforesaid meeting, the Applicant states that the agenda was simple, that he was asked to step down as a director and transfer, forfeit without value attached and/or relinquish 100 of his shares to his replacement, Mr. Alexander Mwangi Magu, the 2nd Interested Party.

14. The Applicant's case is that he refused to heed the directors and made it clear that it can only happen if the procedure is followed. He informed the Directors that if the Company is being turned into a family business, then it should be valued and his rightful share given to him and he be let to go. This according to the Applicant did not rest well with the majority shareholder and as such he proceeded to block him from accessing his official email, locking him out of his office and from accessing all his personal belongings.

15. Mr. Magu is alleged to have started sending emails to the company's customers to inform them that he no longer was a director at the company and any dealings with him should be halted at once.

16. According to the Applicant, on or about the 17th January, 2024, the 1st Respondent, through its shareholders/directors, lodged a request to the 2nd Respondent to effect the changes of 2nd June 2023 and through Mr. Joseph Kamau, the 2nd Respondent notified the Applicant of the imminent changes and asked whether or not the changes were legitimate and should be effected.

17. It is the Applicant's case that he rejected the proposed changes stating his reasons on 30th January, 2024. According to the Applicant as a consequence of his refusal to concede the 1st Respondent through Alfred Magu, summarily dismissed him vide a letter dated 11th March, 2024, which letter is said to have been concluded by the statement, the decision is final and non-negotiable.

18. The Applicant states that he made peace with this decision and went ahead to pursue the 1st Respondent for an audit of the Company Assets and Liabilities for him to relinquish his position and rights and the appropriate compensation.

19. During this period the 1st Respondent, is said to have transferred Motor Vehicle Registration Number, KCS 677C, valued at about Kshs.2,800,000.00, that was a company property, to his own name.

20. The Applicant further urges that the 2nd Respondent upon being approached by the 1st Respondent, effected the changes in the Company. According to the CR12 generated on 14th August, 2024, the lst and 2nd Interested Parties were allocated 100 shares each.

21. It is the Applicant's case that the majority shareholder and his wife have refused to approve, to date, the audit report by CM Maingi done on the 22nd February 2024.

22. The Applicant urges that his removal from office without proper notice is an outright violation of Section 139 of the Company's *Act, No. 7 of 2015* and that the company's refusal to cooperate with the valuation of its accounts demonstrates a clear disregard of Article 2(e) of the Articles of Association dated 3rd August 1999.

23. According to the applicant, the failure by the Respondents to rectify the register has caused him severe prejudice, as Alfred Magu Mwangi and his accomplices have been using this new and unprocedural company records to make unauthorized decisions and transactions on behalf the company. That his professional reputation and credibility have also been tarnished. The continued existence of this new company's register allows the majority shareholder to perpetuate further unlawful acts.

24. The Applicant also filed a further affidavit sworn on 18th March 2025 in which he depones that on the issue of the Arbitration clause, it must be noted that a keen perusal of the Articles of Association of the 1st Respondent reveals that disputes to be referred to arbitration are; "to sort out differences between the company and, one of the members, their executors, administrator's or assigns".

25. That the review of a decision-making process by the 1st Respondent which is what he is seeking before this court does not fall under this clause as cited but falls within the mandate of the High Court which exercises supervisory jurisdiction to supervise the exercise of power by those who hold it to ensure that it has been lawfully exercised.

26. The Applicant also asserts that had the 1st Respondent and Interested Parties been desirous of invoking the Arbitration clause prior to this matter, then they should have complied with Section 6 of *Arbitration Act* before they entered appearance and filed pleadings in reply to the application, thus as it stands, they submitted and acquiesced to this Court's jurisdiction.

27. The Applicant states that Article 28 of the Articles of Association of the 1st Respondent company provides for the mode of service of a notice either personally or by post to the registered address of a member appearing in the register of members.

28. Similarly, that Section 281(1) of the *Companies Act* has a proviso to the effect that in convening a general meeting, (other than Amount of notice to be given for general an adjourned meeting), a private company shall give a least twenty-one days' notice. He states that no such notice was served upon him in regard to the meeting of 2nd June,2023.

29. According to the Applicant, the 1st Respondent having failed to comply with the strict requirements of section 281 of the *Companies Act*, from the beginning, as there was no notice convening the meeting, all proceedings and resultant resolutions thereto, including the installation of the 1st and 2nd Interested parties as Directors/Shareholders, are void ab initio.

30. He further states that although a purported undated resolution of the Company was prepared of another meeting allegedly held virtually on 19th June,2023 to the effect that the majority shareholder's wife, Margaret Wanjiku Magu and him would forfeit 100 shares and that each which would be transferred to the Interested parties, the newly appointed as directors/shareholders no resolution of the meeting of 2nd June,2023 seeking to restructure the Company shareholding has been produced.

31. The Applicant states that the decision to call for forfeiture of his 100 shares to the Interested Parties without following the due procedure is in total contravention of the *Companies Act*,2015 as read

together with Articles 70, 75 and 76 and 78 of the Model Articles of the Fourth Schedule of the Companies (General) Regulations, 2015 (the Regulations).

32. He further states that alteration of shareholding is a totally different undertaking from restructuring of shareholding through forfeiture of shares as captured in the 1st Respondent's impugned resolution of a meeting held virtually on 19th June,2023 giving effect to the changes effected by the 2nd Respondent on instructions of the 1st Respondent.

33. It is his case that section 404 of the *Companies Act*,2015 as read together with Articles 87,88,89 and 90 of the Model Articles of The Fourth Schedule of the Companies (General) Regulations, 2015 (the Regulations) provide for the procedure of alteration of shareholding through increasing its share capital by allotting new shares or through reducing its share capital in accordance with the Act.

34. Additionally, that a company that wishes to alter its shareholding may subdivide or consolidate all or any of its share capital only in accordance with the strict requirements section 405 of the *Companies Act*,2015 and not in any other self-arrogated procedure as purportedly done by the 1st Respondent. He also avers that he did not sign any documents including the statutory declaration purportedly sworn on 19th June,2023 and the Transfer Form D.

35. It is the Applicant's case that he sought audience with the 2nd Respondent requesting for the correction of the register but there was failure to comply necessitating the instant motion.

The 1st Respondent's Response

36. In response, the 1st Respondent filed a Replying Affidavit sworn by Alfred Magu Mwangi who introduces himself as the Director of the 1st Respondent on 18th October 2024.

37. The 1st Respondent's case is that this honourable court does not have the jurisdiction to entertain the present suit as filed as the Applicant was guilty of non-disclosure of material facts when applying for leave. According to the 1st Respondent the Applicant deliberately failed to disclose that Clause 30 of the 1st Respondent's Articles of Association provides for arbitration as the dispute resolution mechanism between the company and any of its members.

38. The 1st Respondent further states that the Applicant is a member of the 1st Respondent and that despite making reference to the 1st Respondent's Articles of Association, the Applicant deliberately failed to annex the same in his ex parte application, which Articles would have clearly informed the Court on the envisaged mode of dispute resolution.

39. The 1st Respondent also contends that the issue being raised by the Applicant herein is an employment dispute, which ought to be raised and determined in the Employment and Labour Relations Court pursuant to Article 162(2) of the *Constitution*. Further, that the other issues raised by the Applicant touch on company matters under the *Companies Act* and as such ought to be rightly determined by the Commercial Division of the High Court, more so when the issues raised by the Applicant call for a merit review of the impugned alleged decisions.

40. The 1st Respondent's further contends that where there is an alternative forum of dispute resolution which is more appropriate to resolve legal and factual issues such as the ones raised in the present application, then this Court should decline jurisdiction.

41. It is also stated that in so far as the application seeks an order of Certiorari, the same is time barred and offends the provisions of Order 53 Rule 2 of the Civil procedure Rules and Section 9(3) of the *Law Reform Act*. According to the 1st Respondent the Applicant seeks to quash the 1st Respondent's

resolution made on 2nd June 2023, an inordinate delay of 15 months. It is further urged that the Applicant is statutorily time barred and this Court cannot entertain the same.

42. According to the 1st Respondent, the Applicant herein seeks to have this Honourable Court to undertake a merit review of the alleged impugned decisions, by looking into the invalidity or otherwise of the reasons for his termination from employment, looking into the invalidity or otherwise of the reasons for the restructuring of the shareholding and even to adopt an audit report and dissolve the company yet the suit as filed does not allow for the same.

43. The 1st Respondent states that the Applicant was not appointed as Director of Operations of the 1st Respondent until a resolution was passed during the meeting held on 2nd June 2023, which also addressed shareholding restructuring. Further, that a follow-up meeting on 19th June 2023 confirmed the restructuring. The Applicant is said to have attended both meetings after being properly notified and as such, it is inconsistent for the Applicant to challenge the outcomes of these meetings while accepting his appointment as Director of Operations.

44. The Applicant, it is contended, that at paragraph 5 of his supporting affidavit, has admitted to taking advantage of his position in the company, to not only stealing from the company, but conferring a benefit upon himself and his family.

45. The Applicant is alleged to be withdrawn Kshs. 6,372,677 from the 1st Respondent's bank accounts without director approval for personal use. That upon discovery, he admitted the misconduct in a letter dated 11th May 2023, offered property as partial restitution, and agreed to forgo dividends. The 1st Respondent reported the matter to Kilimani Police Station and all involved parties recorded statements with the DCI.

46. Regarding shareholding changes, it is asserted that they were conducted in accordance with the Company's Articles of Association and the *Companies Act*. That th Applicant attended the 2nd June 2023 meeting, participated in the resolutions and voluntarily signed documents including a Statutory Declaration dated 19th June 2023 and a Transfer Form D to effect the shareholding changes.

47. That these documents were then lodged with the 2nd Respondent, who verified them and even contacted the Applicant for confirmation. That although the Applicant mentioned "pending issues," he neither specified them nor raised any formal objection with the 1st or 2nd Respondents. Consequently, it is contended that the Applicant cannot now challenge decisions he actively participated in and endorsed.

The 1st respondent's Supplementary Affidavit

48. The 1st Respondent filed a supplementary affidavit sworn by Alfred Magu Mwangi on 16th April 2025 in response to the further affidavit sworn and filed by the exparte applicant.

49. In the said supplementary affidavit, the 1st Respondent contends that Section 9(2) of the *Fair Administrative Action Act* was enacted to give life to Article 47 of the *Constitution* which provides that the court shall not review an administrative action or decision unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

50. It was reiterated that the Applicant was aware of the meeting of 2nd June 2023 and its agenda. Further, that he used to attend all company meetings together with the two directors of the company. According to the 1st Respondent, in a meeting held on 15th May 2023, it became apparent that owing to the Applicant's fraudulent actions, there was need to restructure the company.

51. It is urged that a proposal was made and it was agreed that the company restructuring, would begin after 1st June 2023 and that subsequently, on 29th May 2023, in a meeting of three members of the company, it was agreed that the meeting on restructuring as agreed in the meeting of 15th May 2023, would be held on the following Thursday. The 1st Respondent states that that those minutes were duly signed by the Applicant.

52. Further, that the meeting was held on 2nd June 2023 and that the Applicant was duly aware and had sufficient notice of the meeting, was present and even participated in the deliberations culminating in the decision to restructure the company. According to the 1st Respondent, the Applicant did not raise any issue whatsoever in the said meeting.

The 1st Interested Party's Response

53. The 1st Interested Party filed a replying affidavit sworn on 18th October 2024 by Victor Muturi Gachanja who introduces himself as a Director/ Shareholder of the 1st Respondent.

54. In his affidavit, Mr. Muturi avers that he became a director/shareholder of the 1st Respondent company pursuant to a resolution passed in a members' meeting held on 2nd June 2023. Further, that the Applicant herein and all the other members of the 1st Respondent were present in the meeting. It is his case that a unanimous decision was arrived at to bring him on board as a shareholder and director of the company. That it was agreed that the Applicant herein would transfer 100 shares to the interested party. It was also agreed that he would double up as the finance director of the 1st Respondent.

55. The interested party further states that a subsequent meeting was held on 19th June 2023 where the said restructuring was confirmed. The 1st Interested Party states that he signed all the requisite documents to effect the resolution and have the changes formally reflected in the companies registry. He deposes that he signed the statutory Transfer Form D which document had also been duly executed by the Applicant herein at the time he was signing the same. Further, that he also signified his consent and acceptance in form CR6 and through a letter dated 2nd June 2023, he accepted his appointment as a director as required.

56. The deponent states that all procedures relating to the change in shareholding and his appointment as finance director of the 1st Respondent were lawfully followed with the Applicant's full consent and the he has since taken up his duties in that role. It is his case that the current application is inconsistent, procedurally defective and an abuse of court process and that it should be dismissed with costs.

57. He further states that the High Court lacks jurisdiction due to the 1st Respondent's Articles of Association, which require arbitration for disputes involving members. Additionally, that some of the Applicant's claims relate to employment matters, which fall under the Employment and Labour Relations Court, while others are commercial issues better suited for the Commercial Division of the High Court.

The 2nd Interested Party's Replying affidavit

58. The 2nd Interested Party filed a Replying Affidavit sworn on 18th October 2024 by Alexander Mwangi Magu who introduces himself also as a Director/ Shareholder of the 1st Respondent.

59. The 2nd Interested Party states that he became a director and shareholder of the 1st Respondent following a resolution passed during a members' meeting held on 2nd June 2023. He states that the Applicant and all other members of the company were present at the meeting, and a unanimous decision was made to bring him on board.

60. It is his position that it was agreed that Margaret Wanjiku Magu, one of the existing shareholders, would transfer 100 shares to him. Also, that he would serve as the Properties Director of the company. That this restructuring was later confirmed in a subsequent meeting held on 19th June 2023.

61. According to the 2nd interested party, following these resolutions, the 2nd Interested Party signed all the necessary documents to effect the changes, including the statutory Transfer Form D, which had already been executed by Margaret Wanjiku Magu. That he further gave his formal consent to act as a director through Form CR6 and accepted his appointment in writing via a letter dated 2nd June 2023. He affirms that the entire process of altering the company's shareholding and appointing him as a director was conducted lawfully and in accordance with the required procedures.

62. He notes that Margaret Wanjiku Magu, having willingly participated in the process, has not raised any objections and that since his appointment, he has assumed his role as the Properties Director of the 1st Respondent and has been actively performing his duties in that capacity. He also states that some of the issues raised by the Applicant ought to be canvassed before the Employment and Labour Relations Court and the Commercial Division of the High Court.

Submissions

63. The application was canvassed by way of written submissions.

64. The Applicant filed his written submissions dated 18th March 2025. In the said submissions, he relies on Article 165 on the jurisdiction of the High Court. He also relies on the case of Republic v Magistrates Court, Mombasa; Absin Synegy Limited (Interested Party) (Judicial Review E033 of 2021) [2022] KEHC 10 (KLR) (24 January 2022) (Judgment) where the court held that a judicial review is a review by a High Court judge of a decision, intended decision, or failure to make a decision, in order to assess whether it is unlawful or invalid.

65. On the scope of judicial review, the Applicant relies on the case of Pastoli v Kabale District Local Government Council & Others (2008) 2 EA 300. The Applicant submits that the application herein seeks to challenge the unlawful decision-making process of the Respondents jointly and/or severally to change the directorship and shareholding of the 1st Respondent Company unprocedurally. He relies on the case of Republic vs Director of Immigration Services & 2 others Exparte Olamilekan Gbenga Fasuyi & 2 others [2018] eKLR where the court observed that judicial review is about the decision-making process and that where a decision has been made within the confines of the law then the court will not interfere.

66. The Applicant also relies on the case of Eunice Soko Mlagui v Suresh Parmar & 4 others [2017] eKLR where the court held that the court may nonetheless decline to grant a stay of proceedings and refer the matter to arbitration if the request is not made when entering appearance or is made after the defence has been filed.

67. On the scope of judicial review, the Applicant relies on the Ugandan case of Pastoli v Kabale District Local Government Council and Others [2008] 2 EA 300. It is submitted that the Fair Administrative Actions Act was enacted to give practical effect to the right to fair administrative action protected by Article 47 of the *Constitution*. The Applicant also refers to section 7 of the *Fair Administrative Action Act* on a Court's or Tribunal's jurisdiction to review and administrative action or decision.

68. On the importance of a notice for the meeting being issued, the Applicant relies on the case of Wambeye Kimweli Marakia V Board of Directors, Nzoia Water Services Co. Ltd & 2 Others; Nzoia Water Services Co. Ltd (Interested Party) [2021] eKLR where the court emphasised that for a meeting to be fruitful,

a notice and agenda of the meeting must be issued. According to the Applicant as per section 281(8) of the Act a meeting that does not comply with the requirements of section 281 is void.

69. It is also the Applicant's submission that the 1st Respondent company was incorporated on 10th August 1999 under the now repealed *Companies Act* (Cap 486) and that the current governing law is the *Companies Act*, 2015, which came into effect on 11th September 2015 and repealed Cap 486.

70. However, that the Sixth Schedule of the 2015 Act includes transitional provisions that preserve the application of Table A from the First Schedule of the repealed Act. As such, both the company's Memorandum and Articles of Association, Table A (where relevant), and the 2015 Act govern the company's affairs.

71. It is submitted that pursuant to section 323 of the *Companies Act*, the nature of shares or other interest of a member in a company are personal property. Further, that article 75 of the Model Articles of Association is instructive on forfeiture of Company shares while article 78 is said to provide for the procedure following the forfeiture of shares.

72. The Applicant also relies on the case of Republic v *Registrar of Companies & 2 others (Miscellaneous Application E547 of 2022*) [2023] KEHC 19417 (KLR) (Commercial and Tax) (30 June 2023) (Ruling) where the court observed that ultimately, the authority to forfeit shares rests primarily with the Company. However, that in exercising this power, the Company must adhere to due process and provide the shareholder with a fair opportunity to be heard.

73. The Applicant contends that the 2nd Respondent's process of making changes to the Company register on account of a resolution of alleged forfeiture of shares despite his protests is an illegality, was marred with procedural impropriety and irrationality.

74. According to the Applicant, despite the fact that the 2nd Respondent has power to reject registration of documents where the same do not comply with the law, they approved changes to the 1st Respondent's register on account of a resolution of alleged forfeiture of share despite the Applicant's protests that the decision-making process was marred with procedural impropriety and irrationality.

75. He relied on Republic v Registrar of Companies Ex Parte Independent Electoral Board of Kenya National Chamber of Commerce & Industry (KNCCI) [2016] eKLR where the Court is said to have noted the power of the 2nd Respondent to reject registration of non-compliant documents provided the same was done in accordance with Article 47 of the *Constitution*.

76. The Applicant submits that the 2nd Respondent had a duty to invoke the provisions of sections 847 and 860 of the *Companies Act* in order to remedy the illegality occasioned to the Applicant but he failed to do so in total contravention of inter alia Article 47 of the *Constitution* of Kenya,2010.The Applicant relies on the case of Judicial Service Commission vs. Mbalu Mutava & Another [2015] eKLR, Civil Appeal 52 of 2014 where the court observed that administrative actions are now subject to Article 47(1) of the *Constitution*.

77. It is the Applicant's further submission that he has established the threshold for grant of the orders of Certiorari sought in the motion dated 25th September,2024.

78. On the grant of the order of Certiorari he relies on the case of *Kenya National Examination Council vs. Republic Exparte Geoffrey Gathenji & 9 Others, Nairobi Civil Appeal No.266 of 1996*.

79. The Applicant also submits that a reading of sections 863(1) and 864 of the *Companies Act*,2015 shows that the Court has power to issue an order directing the Registrar to rectify any entry in the register.

On the grant of an order of Mandamus the Applicant relies on the case of Republic v Jomo Kenyatta University of Agriculture and Technology Ex parte Elijah Kamau Mwangi [2021] eKLR.

80. It is also submitted that in Republic vs The Commissioner of Lands & Another Ex-Parte Kithinji Murugu M'agere, Nairobi High Court Misc. Application No. 395 of 2012 the court observed that Mandamus is employed to enforce the performance of a public duty which is imperative, not optional or discretionary, with the authority concerned.

The 1st Respondent's and Interested Parties' submissions

81. The 1st Respondent and the Interested Parties filed joint written submissions dated 16th April 2025.

82. On the issue of jurisdiction, they submit that a court can only exercise jurisdiction as conferred by the *Constitution* or other written law. They also maintain that Clause 30 of the 1st Respondent's Articles of Association clearly provides for an alternative mode of dispute resolution.

83. They rely on section 9(2) of the *Fair Administrative Action Act* and on the case of Republic vs. Joe Mucheru, Cabinet Secretary Ministry of Information Communication and Technology & 2 others; Katiba Institute & another (Ex parte); Immaculate Kasait, Data Commissioner (Interested Party) (Judicial Review Application E1138 of 2020 [2021] KEHC 122 (KLR) (Judicial Review) (14 October 2021)(Judgment) where the court is said to have discussed the import of the above section. They also rely on Republic vs. Kenya Pipeline Company Limited; M/S Helint Aviation Limited & another (Interested Parties) Ex parte Lady Lori (Kenya) Limited [2021] eKLR where the court emphasised on the need to observe the principle of alternative dispute resolution.

84. It is submitted that the Applicant has not demonstrated that the alternative remedy provided by the Articles he is bound by will not be efficacious nor has he applied for exemption under section 9(4) of the *Fair Administrative Action Act*.

85. The 1st Respondent and Interested Parties submit that as was held in the case Nesco Services Limited vs. *Ethics and Anti-Corruption Commission Act* [2024] KEHC 5217 (KLR) (Civ) (18 May 2024) (Ruling), leave maybe denied or later set aside if there has been deliberate misrepresentation of concealment of material facts. That the Court in Republic v County Government of Nairobi & 2 others Ex parte Mackos Sacco through Jonathan Mutua-Chairman & 2 others; Olive Tree Investments (Interested Party) [2021]eKLR observed that the application before it ought to have fallen on account of suppressing facts that were material to the application.

86. On Prayer number 2 of the application seeking to impugn and quash the decision of the 1st Respondent terminating the Applicant's employment as Director Operations, the 1st Respondent and Interested Parties rely on the case of Republic vs. National Land Commissions Ex parte Ephrahim Muriuki Wilson & others [2018] eKLR where the court held that sometimes matters camouflaged in what appears to be constitutional issues or judicial review may turn out to be a labour or land dispute.

87. This court, it is urged has declined jurisdiction when faced with somewhat similar circumstances in the case of Maalim & 2 others vs. Business Registration Services; Ragus & 3 others [2024] KEHC 9532 (KLR) (Judicial Review) (30 July 2024) (Ruling). This was also the position in the case of Republic vs. Registrar of Companies & 2 others; Waterfront Outlet Limited (C.147966) (Interested Party); Waterfront Outlets Limited (CPR/2015/214503) (Ex parte) (Miscellaneous Application E059 of 2022) [2023] KEHC 227 (KLR) (Judicial Review) (19 January 2023) (Ruling).

88. The 1st Respondent and Interested Parties also submit that the Applicant at paragraph 10 of his Supporting Affidavit admits that the decision he seeks to be quashed was made on 2nd June 2023 more that 15 months before the filing of these judicial review proceedings. It is also submitted that

the Applicant also seeks to quash the decision by the 1st Respondent removing him as the Director Operations which decision the Applicant concedes was made on 11th March 2024.

89. It is submitted that from the CTS portal, these judicial review proceedings were filed on 13th September 2024, which is more that 6 months since the impugned decision was made and as such, the same cannot issue as it is time barred. The 1st Respondent and Interested Parties rely on the cases of Republic vs. Land Registrar Busia & 2 others; Nyabola (Ex parte Applicant) (Environment and Land Judicial Review Case E003 of 2023) [2024] KEELC 1319 (KLR) (12 March 2024) (Judgment) and Republic vs. Deputy County Commissioner Makindu Sub-County, Makueni County; Dismus Kasio Siva & 7 others (Interested Parties) Ex parte Joel Mutuku Musango & 3 others [2019] eKLR.

90. It is the 1st Respondent and Interested Parties' argument that as Prayers numbers 3 and 4 are pegged on Prayer number 2, then, the same automatically collapse. According to them, considering the circumstances of the instant case, a Mandamus order can only issue after and only if the Certiorari order is issued quashing the alleged impugned decisions. The case of Kenya National Examination Council vs. Republic Ex parte Geoffrey Gathenji Njoroge & 9 others [1997] eKLR is relied on, on the nature on an order of Mandamus.

91. According to the 1st Respondent and Interested Parties, the Applicant having approached this court under Order 53 of the Civil Procedure Rules, cannot expect it to undertake a merit analysis of the alleged impugned decisions. They rely on the case of Dande & 3 others v Inspector General, National Police Service & 5 others (Petition 6 (E007),4(E005) & 8(E010) of 2022 (Consolidated) [2023] KESC 40 (KLR) (16 June 2023) (Judgment).

92. It is also submitted that no evidence has been adduced to show that the Applicant was a director, that he was a signatory to the company's accounts or that all the directors signed and/or authorised the withdrawal of the company's funds for his benefit. That there is also no resolution regarding the same.

93. They also submit that if the Applicant's intention is to litigate over dissolution of the company as is evident from his prayer number 5, then this court is not the appropriate forum and that the manner that he has approached the court is equally not the appropriate manner to substantively address the same.

Analysis and Determination

94. I have considered the application and affidavits in support, the responses, annextures, case law and submissions by the parties and I find the following issues are for determination:

    a. Whether this Court has jurisdiction to entertain the judicial review application;

    b. Whether the Applicant has made out a case for the grant of the orders sought.

    c. What orders should this Court make

On whether this Court has jurisdiction to entertain the judicial review application;

95. The 1st Respondent and the Interested Parties before have faulted the Applicant for deliberately failing to disclose that Clause 30 of the 1st Respondent's Articles of Association provides for arbitration as the dispute resolution mechanism between the company and any of its members.

96. It is their case that a court can only exercise jurisdiction as conferred by the *Constitution* or other written law. They also state that Clause 30 of the 1st Respondent's Articles of Association clearly provides for an alternative mode of dispute resolution.

97. In response, the Ex parte Applicant argues that it must be noted that a keen perusal of the Articles of Association of the 1st Respondent reveals that disputes to be referred to arbitration are; "to sort out differences between the company and one of the members, their executors, administrator's or assigns".

98. According to the Applicant, the review of a decision-making process by the 1st Respondent which is what he is seeking before this court does not fall under this clause as cited but falls within the mandate of the High Court which exercises supervisory jurisdiction to supervise the exercise of power by those who hold it to ensure that it has been lawfully exercised.

99. The Applicant also argues that had the 1st Respondent and Interested Parties been desirous of invoking the Arbitration clause prior to this matter, then they should have complied with Section 6 of *Arbitration Act* before they entered appearance and filed pleadings in reply to the application. Thus, that as it stands, they already submitted and acquiesced to this Court's jurisdiction.

100. I have examined the Articles of Association of Opus Properties Limited annexed to the 1st Respondent's Replying Affidavit. I note that Clause 30 reads as follows;

> " Whenever any difference arises between the company on the one hand and any of the members, their executors, administrators, or assigns on the other hand, or consequences of these Articles, or of the statutes, or touching anything then or thereafter done, executed, omitted, or suffered in pursuance of these Articles, or of the statutes or touching any breach, or alleged breach, of these Articles, or any claim on account of any such breach or alleged breach, or otherwise relating yo; the premises, or to these Articles or to any status affecting the company, or any of the affairs of the company, every such difference shall be referred to the decision of any arbitrator, to be appointed by. the parties in difference, or if they cannot agree upon a single arbitrator to the decisions of two arbitrators, of whom one shall be appointed by each of the parties in difference."

101. From the onset, it is trite that whereas courts may intervene notwithstanding such clauses where the dispute involves public law elements or allegations of procedural impropriety in administrative actions, the primary nature of the dispute must guide the Court.

102. In this case, the dispute involves corporate governance, shareholding and internal management decisions of a private company. These are fundamentally commercial disputes that fall within the purview of arbitration or the Commercial Division of the High Court, and not the Judicial Review jurisdiction.

103. In that regard, the Court of Appeal in the case of Nyaoga v Chairman Kisii County Assembly & 3 others [2023] KECA 1540 (KLR) observed that:

> " 19. 19.The main issues that would dispose of this appeal is whether or not the appellant had exhausted all the available alternative remedies before invoking the court's jurisdiction; whether or not trial court had jurisdiction; and the place of the doctrine of exhaustion.
>
> 20. The doctrine of exhaustion of remedies was created by courts in order to promote an efficient justice system and autonomous administrative state. It is a principle that requires parties to exhaust all available local administrative remedies before seeking redress in a court of law on a constitutional issue. An aggrieved party must first pursue all avenues of relief found within the administrative agency responsible for the issue at hand. The reason for this is

to allow administrative agencies to address, and to potentially resolve the issue before escalating the same to the courts.

21. Indeed, this Court in Mutanga Tea & Coffee Company Ltd vs. Shikara Limited & Another [2015] eKLR cited with approval the case of Speaker of the National Assembly vs. Karume [2008] 1 KLR 425 where the court stated: "where there is a clear procedure for redress of any particular grievance prescribed by the *Constitution* or an act of parliament that procedure should be strictly followed."

22. This Court in Geoffrey Muthinja & Another vs. Samuel Muguna Henry & 1756 Others (2015) eKLR gave credence to the view that it is essential to utilize non-judicial methods of dispute resolution before turning to the courts. Courts should not be the initial choice for resolving conflicts within organizations, as this may lead to unnecessary legal battles."

104. Similarly, the court in the case of William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) [2020] KEHC 10266 (KLR) observed thus:

> "The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts."

105. Even if the respondents and the interested parties acquiesced to the jurisdiction of the Court by entering appearance and filing their substantive responses instead of objecting to jurisdiction, it is evident that the Applicant's grievance is not centered on the procedure followed by the 1st Respondent or the Registrar, but rather on the outcome of the corporate resolutions and share transactions.

106. Judicial review is not an appeal from a decision, nor is it concerned with the merits, but rather with the legality of the decision-making process. The Applicant's arguments would have been more appropriately canvassed in a commercial suit, where evidence would be adduced and parties cross examined, not a judicial review motion.

107. The court in Nyaoga v Chairman Kisii County Assembly & 3 others (supra) went ahead to observe as follows;

> "That having been said, this Court also needs to look at the flip side and discuss the exception to the doctrine of exhaustion before coming to our final conclusion. These exceptions provide circumstances where an individual may bypass the exhaustion requirement and directly seek redress from court. In Chief Justice and President of the Supreme Court of Kenya & Another vs. Bryan Mandila Khaemba [2021] eKLR this Court acknowledged that the doctrine of exhaustion notwithstanding, courts still retain residual jurisdiction to intervene in exceptional circumstances despite existence of alternative remedies where the action complained of is marred by illegality and procedural irregularities.

25. As provided in section 9(4) of the *Fair Administrative Action Act*, there are exceptions to the exhaustion rule in exceptional circumstances [underlined

and emboldened for emphasis]. In the case of Republic vs. National Environmental Management Authority Ex Parte Sound Equipment Ltd, [2011] eKLR this Court stated:"...where there was an alternative remedy and especially where parliament had provided a statutory appeal procedure, it is only on exceptional circumstances that an order for judicial review would be granted and that in determining whether an exception should be made...it is necessary for the court to look carefully at the suitability of the statutory appeal in context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it."

26. Section 9(4) of the Fair Administrative Actions Act provides that the High Court or subordinate Court may, in exceptional circumstances and on application by the applicant exempt such person from the obligation to exhaust any remedy if the court considers such remedy to be in the interest of justice. See the William Odhiambo Ramogi case (supra) paragraphs 60 & 61.

108. The Court of Appeal in the case of Fleur Investments Limited v Commissioner of Domestic Taxes & another [2018] eKLR observed thus:

> " Whereas courts of Law are enjoined to defer to specialised Tribunals and other Alternative Dispute Resolution Statutory bodies created by Parliament to resolve certain specific disputes, the court cannot, being a bastion of Justice, sit back and watch such institutions ride roughshod on the rights of citizens who seek refuge under the *Constitution* and other legislations for protection. The court is perfectly in order to intervene where there is clear abuse of discretion by such bodies, where arbitrariness, malice, capriciousness and disrespect of the Rules of natural justice are manifest. Persons charged with statutory powers and duties ought to exercise the same reasonably and fairly."

109. In view of the foregoing jurisprudence, it is clear that while the doctrine of exhaustion and arbitration clauses are to be respected, courts may intervene where exceptional circumstances exist such as where there are allegations of illegality, procedural impropriety, or abuse of power.

110. The Applicant has not demonstrated that this matter falls within any of the exceptions to the doctrine of exhaustion. He also did not apply for exemption to the alternative dispute resolution mechanisms.

111. Besides, as earlier stated, the claim as a whole is a pure commercial dispute between the applicant, the company and the manner in which the company shares were transferred to the interested party.

112. Although allegations of procedural impropriety and fraud have been raised, they are not supported by cogent evidence, nor is there a persuasive showing that recourse to the Companies Registry, the Business Registration Service, or another regulatory forum would have been inadequate, futile, or rendered ineffective. No exceptional circumstances were pleaded or established to warrant the Court's intervention in the commercial dispute, in the absence of prior engagement with available statutory mechanisms.

113. No compelling reason has been advanced as to why the Applicant failed to pursue arbitration as provided under Clause 30 of the Articles of Association, or why the dispute could not have been addressed through the commercial or corporate dispute resolution mechanisms established under the *Companies Act* or through the Commercial Division of the High Court. It is also worth noting that

the applicant did not even disclose that there was an arbitration clause in the Articles of Association of the Company, until the respondents and the interested party filed their responses.

114. Judicial Review proceedings are neither civil nor criminal proceedings. To hold the respondents to acquiesce to jurisdiction for not making an application for stay of these proceedings and referral of the matter to arbitration is to say that this court must assume jurisdiction of commercial disputes and determine the merits of those disputes.

115. It is not lost to this Court that specifically, the *Companies Act*, 2015 establishes a range of statutory mechanisms through which disputes of the nature presented pertaining to shareholding, directorship and company resolutions may be addressed.

116. These mechanisms include the filing of an unfair prejudice petition under Section 780, derivative claims under Sections 238 to 240, or reference of the dispute to the Registrar of Companies under Section 860 where procedural improprieties or mismanagement are alleged.

117. Additionally, even without resorting to arbitration, the High Court's Commercial and Tax Division is the forum ordinarily mandated to hear corporate disputes of this nature, including matters relating to internal governance, shareholder rights, and the validity of company resolutions. The Applicant has not explained why these alternative statutory and contractual avenues were not exhausted prior to invoking judicial review.

118. Further, I reiterate that the mere filing of pleadings by the Respondents and therefore, their acquiescence of jurisdiction of this Court does not confer jurisdiction upon this Court where none exists. Jurisdiction is a matter of law, not acquiescence. As held in Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1, jurisdiction is everything and without it, a court must down its tools.

119. In light of the foregoing, I find that this Court lacks jurisdiction to entertain the present application on account of the binding arbitration clause, the availability of alternative remedies under the *Companies Act* and the absence of exceptional circumstances warranting judicial intervention.

120. I further observe that the application before the Court seeks orders of Certiorari to quash the resolutions made on 2nd and 19th June 2023. However, the present proceedings were not instituted until 28th August, 2024, well beyond the six-months limitation period set under Section 9(3) of the *Law Reform Act* and Order 53 Rule 2 of the Civil Procedure Rules. The circumstances of this case are such that unless Certiorari is issued to quash the impugned decisions, Mandamus cannot issue as sought.

121. The Applicant has argued that he raised a formal protest to the Registrar of Companies, objecting to the registration of the impugned resolutions and changes. While the Registrar, as an administrative body, is required under Article 47 of the *Constitution* and Section 4 of the *Fair Administrative Action Act* to act fairly and reasonably, the material placed before this Court does not show that the Registrar's conduct was arbitrary, in bad faith, or in violation of procedural fairness. The protest was not accompanied by prima facie evidence of fraud or irregularity capable of triggering administrative restraint.

122. My view is that this aspect of the dispute would be better ventilated through a timely and focused challenge, possibly in a commercial forum. It does not provide a sufficient basis to invoke the Court's judicial review jurisdiction, especially where the application for the remedy of Certiorari is time-barred and other jurisdictional and procedural defects persist.

123. Additionally, upon examining the annexures filed in these proceedings, the Court notes that the Applicant attended both meetings held on 2nd June 2023 and 19th June 2023, during which, the

directors of the 1st Respondent resolved to restructure the company. Notably, the resolutions included that the Applicant and one Margaret Wanjiku Magu would forfeit 100 shares to the Interested Parties.

124. The material before the Court further shows that the Applicant voluntarily signed a Form of Transfer dated 19th June 2023, and executed a statutory declaration on the same date expressly acknowledging his intention to transfer 100 shares to one Victor Muturi Gachanja. These actions demonstrate active participation and acquiescence in the disputed transactions.

125. In the absence of any evidence of coercion, fraud, or procedural irregularity in the making of these decisions and execution of the relevant documents, the Applicant cannot now seek to disown the consequences of his voluntary acts under the guise of judicial review.

126. Further, the Court notes that as evidenced by the email dated 17th January 2024, the 1st Respondent reached out to the Applicant to confirm whether or not the application to effect changes in the company's shareholding and directorship was legitimate. The Applicant did in fact respond to the said inquiry, as shown by his email dated 30th January 2024. He claimed that the request for changes in the shareholding were not legitimate since there were pending issues. He did not say that he was not the person who had signed the shares transfer form. Neither did he say what issues were pending and what made the application illegitimate, The Applicant has not placed any material before this Court to demonstrate that the Respondents acted fraudulently or illegally, irrationally, or in breach of procedural fairness in relying on his response or proceeding with the changes thereafter.

127. The Applicant cannot now fault the 2nd Respondent for acting on the basis of his own communication, particularly in the absence of any demonstrable impropriety in the manner in which the changes were processed.

128. This Court reiterates that judicial review is concerned with the decision-making process not the merits of the decision itself. As such, and for all the foregoing reasons, this Court is not persuaded that any ground has been established to warrant the grant of the orders sought.

129. Accordingly, as the Applicant has failed to place before this Court any credible evidence demonstrating that the Respondents acted unlawfully, irrationally, or in breach of fair administrative action, the threshold for intervention under judicial review has not been met.

130. The application is therefore struck out for want of jurisdiction, the dispute being of purely commercial nature, with Articles of Association providing for arbitration, the prayer for Certiorari being sought ed out of the six months stipulated period from the date of the impugned decisions and failure to demonstrate any exceptional circumstances justifying the Court's intervention.

131. Each party shall bear its own costs.

132. This filed is closed.

133. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 23RD DAY OF JUNE 2025

R.E. ABURILI

JUDGE